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You Are Not Cordially Invited: How Universities Maintain First Amendment Rights and Safety in the Midst of Controversial On-Campus Speakers

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NOTE

YOU ARE NOT CORDIALLY INVITED: HOW UNIVERSITIES MAINTAIN FIRST AMENDMENT RIGHTS AND SAFETY IN THE MIDST OF CONTROVERSIAL ON-CAMPUS SPEAKERS

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INTRODUCTION

At the University of California, Berkeley's campus in the mid-1960s, the Free Speech Movement was at the center of campus dynamics as students protested the administration's ban on political activities on campus.[1] A different set of free-speech concerns has since infiltrated Berkeley's campus and that of higher-education institutions throughout the country. Against a backdrop of national political turmoil, universities have experienced volatile reactions from their student bodies and outsiders in protest of the inflammatory speakers that schools host on their campuses. When "alt-right" commentator Milo Yiannopoulos was scheduled to make a speech in February 2017 at Berkeley, peaceful protests against Yiannopoulos soon descended into violence.[2] Berkeley then canceled his speech due to safety concerns.[3]

While Berkeley's critics chastised the university for impinging on the free-speech interests of the conservative student group that sponsored the speakers,[4] ideologically-opposed student groups have their own First Amendment interests in protesting these speeches.[5] As a public university, Berkeley has the obligation to enforce these First Amendment constitutional requirements.[6] But it also has the duty to maintain a nonviolent environment for its students, avoiding tort liability for any potential student harm arising from the university's failure to do so.[7] And Berkeley's situation is not unique. While Berkeley continues to grapple with these conflicts on its campus,

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1 *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 13 (2017); Bret Eynon, *Community in Motion: The Free Speech Movement, Civil Rights, and the Roots of the New Left*, ORAL HIST. REV., Spring 1989, at 39, 51.

2 Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Caused $100,000 in Damage*, CNN (Feb. 2, 2017, 8:33 AM), http://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/ [https://perma.cc/7KU5-7GP3].

3 *Id.*

4 *See, e.g.*, Donald Trump (@realDonaldTrump), TWITTER (Feb. 2, 2017, 3:13 AM), https://twitter.com/realdonaldtrump/status/827112633224544256?lang=EN [https://perma.cc/3DVN-8NKT].

5 *See infra* subpart II.A.

6 *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822 (1995).

7 *See infra* subpart II.B.

other universities, such as Auburn University, have similarly balanced these competing interests.[8]

This Note discusses the tension between First Amendment protections and tort liability in the context of higher education. Specifically, it focuses on the interplay between controversial, on-campus speakers and the violent protests that arise in reaction to them. While examining this interaction, this Note emphasizes the legal duties of academic institutions in facilitating these on-campus speakers while also protecting their students' constitutional rights and safety. In examining these conflicts, the Note considers one overarching question: When faced with an impending speech from a controversial figure and the potential for resulting on-campus violence, how do higher-education institutions best protect themselves from both constitutional and tort liability?

Part I provides a background on this issue, contextualizing the question in light of current events at institutions such as Berkeley, the University of Washington, and the University of Florida. It highlights the importance of this question and the urgency in answering it. Next, the Note provides the legal framework for considering the conflict between First Amendment and tort jurisprudence. Part II discusses the First Amendment in the higher-education context by exploring the competing First Amendment concerns of speakers and potential First Amendment limitations in this environment. The Note then provides a discourse on the evolving status of universities' requisite duties in shielding their students from harm and themselves from subsequent tort liability.

Part III predicts the collision between the First Amendment protections and tort obligations in the context of controversial on-campus speakers. This Part first pinpoints potential sources of constitutional and tort violations. Because current constitutional and tort law often prove ineffective in preserving both the First Amendment and safety interests of students, this Note proposes a revised constitutional standard for tackling this issue, one that differs from the solution that legislatures have erroneously adopted. In enacting university policies, colleges should adopt and courts should enforce a revised version of the *Brandenburg v. Ohio* standard. By restricting the speech of controversial speakers in this limited context, this standard

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8 *See* Stephanie Saul, *Richard Spencer Speech at Auburn U. Greeted by Protests*, N.Y. TIMES (Apr. 18, 2017), https://www.nytimes.com/2017/04/18/us/judge-rules-auburn-must-allow-richard-spencer-to-speak.html [https://perma.cc/KTY2-YN2Y].

most effectively protects students from violence while simultaneously maximizing their First Amendment rights. Part IV concludes with guidance on how universities may draft internal policies to adequately confront these issues according to the Note's proposed standard.

I
BACKGROUND

"Ray Kelly, you can't hide, we charge you with homicide."[9] In October 2013, students and other demonstrators at Brown University chanted this during a speech by Raymond Kelly, the former New York City Police Department Commissioner and supporter of the department's controversial stop-and-frisk policy.[10] Due to the audience's continuous disruption, the university administration canceled the speech after only thirty minutes.[11] Unlike later events involving controversial on-campus speakers, the authorities did not cancel the event for safety purposes.[12] However, these protests demonstrate the willingness of students and community members to use college campuses as forums to protest against outside speakers and the contentious viewpoints these speakers represent. This protest signaled the prospect of escalating reactions, setting the stage for increasingly intense responses.

Four years later, this political unrest erupted into physical violence. In January 2017, Milo Yiannopoulos, the notorious conservative pundit and one-time face of the "alt-right," spoke at the University of Washington.[13] Outside the lecture hall, a crowd of Yiannopoulos's protestors and supporters erupted into fights.[14] Bricks and paint were thrown, and one man was shot in the abdomen.[15]

The following month, a protest against an appearance by Yiannopoulos at the University of California, Berkeley again

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9 Jillian Lanney & Carolynn Cong, *Ray Kelly Lecture Canceled Amidst Student, Community Protest*, BROWN DAILY HERALD (Oct. 30, 2013), http://www.browndailyherald.com/2013/10/30/ray-kelly-lecture-canceled-amidst-student-community-protest/ [https://perma.cc/JSA7-6UTY].

10 *Id.*

11 *Id.*

12 *Id.*

13 Katherine Long, Lynn Thompson & Jessica Lee, *Man Shot During Protests of Breitbart Editor Milo Yiannopoulos' Speech at UW; Suspect Arrested*, SEATTLE TIMES (JAN. 21, 2017, 9:43 AM), https://www.seattletimes.com/seattle-news/education/violence-punctuates-uw-talk-by-breitbart-editor-milo-yiannopoulos/ [https://perma.cc/2BC4-H8N3].

14 *Id.*

15 *Id.*

turned hostile. Protestors destroyed campus property as they hurled fireworks, rocks, and Molotov cocktails.[16] They smashed windows, set fires, and plundered construction sites on the campus.[17] The destruction was not limited to property damage. Two students were attacked while conducting an interview.[18] Two others were similarly injured.[19] Protestors pepper sprayed another woman.[20] Because of the violence, the school canceled Yiannopoulos's appearance.[21] Just two months later, Berkeley canceled a speech by another conservative figurehead, Ann Coulter, because it feared a repeat melee.[22]

In March 2017, Charles Murray, a controversial author who once suggested low socioeconomic status is connected to race and intelligence levels, was supposed to speak at Middlebury College.[23] Student protestors disrupted the event, driving Murray out of the building.[24] In the midst of the riot, one faculty member was seriously hurt.[25] She walked away from the fiasco in a neck brace.[26] Later, in October 2017, the white-nationalist leader Richard Spencer spoke at the University of Florida.[27] His speech coincided with a day-long protest. During the protest, one man was punched, and another was arrested.[28] A third man fired a gun.[29]

At one event in November 2017, the speaker himself engaged in violent physical conduct. Lucian Wintrich, another conservative commentator, planned a speech at the University

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16 Park & Lah, *supra* note 2.

17 *Id.*

18 *Id.*

19 *See* Malini Ramaiyer, *How Violence Undermined the Berkeley Protest*, N.Y. TIMES (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/opinion/how-violence-undermined-the-berkeley-protest.html [https://perma.cc/P8MM-7DD9].

20 Park & Lah, *supra* note 2.

21 Ramaiyer, *supra* note 19.

22 Thomas Fuller, *Berkeley Cancels Ann Coulter Speech over Safety Fears*, N.Y. TIMES (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/us/berkeley-ann-coulter-speech-canceled.html [https://perma.cc/LMV6-QE9X].

23 Katharine Q. Seelye, *Protesters Disrupt Speech by 'Bell Curve' Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html?_r=0 [https://perma.cc/U7MK-Q4JK].

24 *Id.*

25 *Id.*

26 *Id.*

27 *Protesters Drown Out Richard Spencer at University of Florida*, N.Y. TIMES (Oct. 19, 2017), https://www.nytimes.com/2017/10/19/us/richard-spencer-florida.html [https://perma.cc/EP8S-AKXZ].

28 *Id.*

29 *Id.*

of Connecticut called "It's OK to be White."[30] Prior to the speech, a woman snatched a copy of his speech from his lectern.[31] Wintrich then chased after the woman and grabbed her in an attempt to take the papers back.[32] He was subsequently arrested and charged with breaching the peace, although the charge was later dropped.[33] These escalating encounters demonstrate a heightened propensity for violent protests at universities. As a result of controversial speakers attempting to exercise their free speech rights at universities, students are subsequently harmed by violence at the hands of other students and community members.

II
LEGAL FRAMEWORK

First Amendment jurisprudence and tort doctrine collide when incendiary speakers come to campus. Campus speakers and protestors alike yield their own First Amendment rights, made complicated by a potential "heckler's veto." In the higher-education context, two particularly important limitations to First Amendment rights exist. Simultaneously, in the realm of tort liability, the duty of reasonable care that a university owes to its students is evolving. This evolution impacts a university's responsibility to protect its students from harm.

A. The First Amendment in the Context of Higher Education

1. *Restrictions on Offensive Speech*

First Amendment rights on college campuses originate from the Amendment's text. The Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or . . . the right of the people peaceably to assemble . . . ."[34] Despite the broad freedoms that the Amendment protects, these freedoms may have limitations.

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30 Derek Hawkins, *Protester Who Grabbed Lucian Wintrich's 'It's OK to Be White' Speech Charged with Theft*, WASH. POST (Dec. 12, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/12/12/protester-who-grabbed-lucian-wintrichs-its-ok-to-be-white-speech-charged-with-theft/?utm_term=.1a80e29847a8 [https://perma.cc/9Z2Q-YGL6].

31 *Id.*

32 *Id.*

33 Jessica Chasmar, *College Adviser Arrested for Scuffle with Gateway Pundit Writer Lucian Wintrich*, WASH. TIMES (Dec. 12, 2017), https://www.washingtontimes.com/news/2017/dec/12/catherine-gregory-college-adviser-arrested-scuffle/ [https://perma.cc/XS7Q-SEYR].

34 U.S. CONST. amend. I.

The Supreme Court has established that the government may not restrict speech based on content alone, including offensive content. For example, in *Texas v. Johnson*,[35] Texas convicted the defendant for publicly burning an American flag in violation of its state law.[36] At the outset of the opinion, the Court determined that the defendant's act was expressive conduct that was entitled to First Amendment protection.[37] The Court then quickly dismissed the State's argument that because flag burning is seriously offensive and likely to disturb the peace, the State may restrict the act.[38] The Court explained:

> Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[39]

The Court then overturned the defendant's conviction, reasoning that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself *offensive* or disagreeable."[40] Because Texas placed an unjustified regulation on the defendant's expression, Texas unconstitutionally infringed on the defendant's free speech rights.[41]

The Court similarly analyzed the extent of First Amendment protections for controversial speech in *Snyder v. Phelps*.[42] Here, members of the Westboro Baptist Church picketed the funeral of an Iraq war veteran, holding signs such as "Thank God for Dead Soldiers," "Priests Rape Boys," and "America is Doomed."[43] The deceased soldier's father brought various tort claims against the church.[44] Ultimately deciding that the First Amendment protected Westboro's speech because it dealt with a "matter of public concern,"[45] the Court emphasized that "[t]he arguably 'inappropriate or controversial

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35 491 U.S. 397 (1989).
36 *See id.* at 399.
37 *See id.* at 406.
38 *See id.* at 408.
39 *Id.* at 408–09 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).
40 *Id.* at 414 (emphasis added).
41 *See id.* at 411–12, 420.
42 562 U.S. 443 (2011).
43 *Id.* at 448.
44 *Id.* at 450.
45 *See id.* at 458, 461.

character of a statement is irrelevant'" to the inquiry.[46] Drawing a hard line in support of free speech, the Court then concluded its opinion: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker."[47] Without further refinement in First Amendment jurisprudence, these cases suggest that universities will face difficulties in limiting the speech of these outside speakers based on *content* alone.

2. *Restrictions on Various Viewpoints*

While the First Amendment prohibits restrictions solely based on the offensiveness of speech, it also prohibits restrictions solely based on the speaker's viewpoint.[48] The key case in the higher education setting is *Rosenberger v. Rector & Visitors of University of Virginia*.[49] In *Rosenberger*, the University of Virginia denied a student-run Christian magazine reimbursement from the university's student-activities fund.[50] Because the magazine constituted a "religious activity," it was not eligible to receive university funding under a specific university guideline.[51] Reflecting the sentiments in *Texas v. Johnson* and *Snyder v. Phelps*, the Supreme Court first established that the government may not engage in content discrimination to "regulate speech based on its substantive content or the message it conveys."[52] The Court then recognized that viewpoint discrimination, a subset of content discrimination, is exceptionally problematic.[53]

The Constitution thus forbids viewpoint discrimination. This occurs when public universities restrict speech, and the "specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[54] While universities may create "limited public forums" and require that their facilities are only used for specified purposes, they still may not engage in viewpoint discrimination when setting these bounda-

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46 *Id.* at 453 (quoting Rankin v. McPherson, 483 U.S. 378, 387 (1987)).

47 *Id.* at 460–61.

48 *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

49 *Id.*

50 *See id.* at 827.

51 *See id.* at 826–27.

52 *Id.* at 828; *see also* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

53 *See Rosenberger*, 515 U.S. at 829.

54 *Id.*

ries.[55] Here, the University of Virginia engaged in viewpoint discrimination because it allowed other student publications to receive funding.[56] Therefore, the college was impermissibly excluding religious viewpoints and violated the student group's First Amendment rights.[57] In turn, this decision has implications for whether universities may constitutionally choose to disinvite certain individuals from speaking on their campuses.

3. *Handling the Heckler's Veto*

Correspondingly, protestors have their own right to assemble and voice their opposition to controversial speakers.[58] However, protestors risk engaging in a "heckler's veto" when their protests overpower these speakers and erode their First Amendment rights.[59] A "heckler's veto" involves the "suppression of speech in order to appease disruptive, hostile, or threatening members of the audience."[60] Governmental agents become the instrumentalities of this suppression as private individuals overbear the First Amendment rights of other private individuals.[61]

The Supreme Court has acknowledged this danger. The Court in *Feiner v. New York* decided against a speaker who claimed that his free-speech rights were violated when he encouraged African-American citizens to fight for equality on a street corner, was arrested, charged for breaching the peace, and subsequently convicted due to the "interest of the community in maintaining peace and order on its streets."[62] Yet the Court still asserted that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker."[63] Justice Douglas further highlighted the potential constitutional issues associated with a heckler's veto in his dissent: "When unpopular causes are sponsored from the public platform, there will commonly be mutterings and unrest and

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55 *See id.*

56 *See id.* at 831.

57 *See id.* at 837.

58 *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (analyzing the right to peaceable assembly in the context of a Communist Party meeting).

59 *See* Howard Gillman & Erwin Chemerinsky, *Does Disruption Violate Free Speech?*, CHRON. OF HIGHER EDUC. (Oct. 17, 2017), http://www.chronicle.com/article/Does-Disruption-Violate-Free/241470?cid=WContentlist_hp_5 [https://perma.cc/PQ89-ZJMQ] ("[T]he right to speak does not include a right to use speech to keep others from speaking.").

60 *Id.*

61 Julien M. Armstrong, Note, *Discarding* Dariano*: The Heckler's Veto and a New School Speech Doctrine*, 26 CORNELL J.L. & PUB. POL'Y 389, 390 (2016).

62 340 U.S. 315, 320 (1951).

63 *Id.*

heckling from the crowd. . . . But those extravagances . . . do not justify penalizing the speaker by depriving him of the platform or by punishing him for his conduct."[64] Notwithstanding that controversial speech may induce protestors to heckle the speaker, this heckling should not override the rights of the speaker, even on university campuses.

4. *Limitations on Student Speech at Public Universities*

Higher-education institutions have constitutional tools at their disposal to limit the speech of students, protestors, and outside speakers to protect their campus communities. Of particular relevance to free speech in the educational context is the seminal Supreme Court case, *Tinker v. Des Moines Independent Community School District*.[65] In *Tinker*, students planned to wear black armbands to their public junior high and high schools to protest the Vietnam War.[66] Upon learning of the students' plans, school authorities created a policy that required any student who wore such an armband to remove it or else face suspension.[67] Despite this policy, the students wore the armbands, and their schools suspended them.[68] The students' parents then filed suit.[69]

Describing the students' act of wearing armbands as resembling "pure speech,"[70] the Court recognized that First Amendment rights are available to students. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[71] Further, students' First Amendment rights encompass every facet of school activities.[72] But the Court also recognized that these constitutional rights are not absolute. Administrators must have the flexibility to enforce their schools' rules and manage the behavior of their students.[73]

Setting out the limitations for free speech of students in this arena, the Court explained, "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the

64 *Id.* at 331 (Douglas, J., dissenting) (citation omitted).
65 393 U.S. 503 (1969).
66 *Id.* at 504.
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.* at 505, 508.
71 *Id.* at 506.
72 *See id.* at 512–13.
73 *See id.* at 507.

rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."[74] To infringe on the free-speech rights of their students, the schools must therefore demonstrate "facts which might reasonably have led school authorities to forecast *substantial disruption of or material interference with* school activities."[75] The expression of the students here did not reach this level,[76] and the administration could not prevent the students from wearing armbands "without evidence that it [was] necessary to avoid material and substantial interference with schoolwork or discipline."[77] Consequently, *Tinker* places potential limitations on the First Amendment rights of both student speakers and student protestors; universities may constrain their speech if it would cause a "substantial disruption of or material interference with school activities."[78]

The Court soon applied the *Tinker* standard to higher-education institutions in *Healy v. James*.[79] There, students at Central Connecticut State College attempted to obtain official recognition from the institution as a local chapter of Students for a Democratic Society (SDS).[80] The university's president denied SDS recognition because of the national organization's perceived philosophy of "disruption and violence."[81] The students subsequently alleged that the university's failure to recognize the organization deprived them of their First Amendment rights of freedom of expression and association.[82]

Recognizing that *Tinker* similarly applies on university campuses, the Court asserted that the president could not deny SDS recognition simply because he disagreed with its views.[83] Instead, the university must demonstrate that recognition of the group would "materially and substantially disrupt the work and discipline of the school."[84] Because the record did not definitively establish that SDS posed a sufficient risk of disruption, the university's denial of the recognition was an

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74 *Id.* at 513.
75 *Id.* at 514 (emphasis added).
76 *See id.*
77 *Id.* at 511.
78 *Id.* at 514.
79 408 U.S. 169 (1972).
80 *Id.* at 172.
81 *Id.* at 174–76 n.4.
82 *Id.* at 177.
83 *Id.* at 180, 188.
84 *Id.* at 189 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

unfounded suppression of the group's First Amendment rights.[85]

Since its inception, courts have continued using the *Tinker* standard to analyze the power of schools to limit the First Amendment rights of their students. Many cases focus on public-school administrations' ability to quash the political speech of its students, albeit often unsuccessfully.[86] For example, in *Pickings v. Bruce*, administrators sanctioned a student group at Southern State College in part, for the group's refusal to rescind its invitation to on-campus speakers that the school believed would "substantially disrupt the educational functions of the College" because their speech would focus on race relations.[87] However, the Eighth Circuit found that the university did not sufficiently establish that the speakers would substantially disrupt the campus.[88] Instead, the record only showed that the speakers "would expose the students and faculty to . . . militant views . . . ; that these views would be apt to exacerbate the tensions between the College and the community; and that these views would be apt to provoke discussions between students and encourage them to action."[89] Therefore, the university's sanctions against the student group impermissibly infringed upon its First Amendment rights.[90] Because of this tendency for courts to uphold the rights of student speakers, universities may still face difficulties constraining disruptive speech on campus, despite the availability of this limitation.

5. *Limitations on Political Speech at Public Universities*

The Supreme Court explored potential limitations on political speech in its pivotal case, *Brandenburg v. Ohio*.[91] In *Brandenburg*, a Ku Klux Klan member was convicted under an Ohio statute for advocating violence, as captured on a news broadcast of a Klan rally.[92] The video showed members in their

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85 *See id.* at 190–91.

86 *See, e.g.*, Barber *ex rel.* Barber v. Dearborn Pub. Schs., 286 F. Supp. 2d 847, 849, 857 (E.D. Mich. 2003) (wearing a tee shirt that displays a photograph of former President Bush with the caption "International Terrorist" does not cause substantial disruption or material interference with school activities); Aryan v. Mackey, 462 F. Supp. 90, 94 (N.D. Tex. 1978) (protesting the Shah of Iran while wearing masks does not pose a high risk of substantial disruption with school activities).

87 430 F.2d 595, 596–97 (8th Cir. 1970).

88 *See id.* at 600.

89 *Id.* at 599–600.

90 *See id.* at 600.

91 395 U.S. 444 (1969).

92 *Id.* at 445.

customary garb, carrying weapons and making distasteful remarks about African-Americans and Jews.[93] In the film, the appellant himself said, "[The Klan is] not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[94]

Despite the extreme offensiveness of the appellant's behavior, the Court reversed his conviction, holding that the statute here violated his First Amendment rights.[95] In the Court's view, the government cannot restrict an individual's "mere advocacy" of violence; doing so would violate the First Amendment guarantee of the freedom of speech.[96] Instead, in the realm of political advocacy, governmental interests in preventing violence may override an individual's First Amendment rights only when that individual's words are "*directed* to inciting or producing imminent lawless action and [are] likely to incite or produce such action."[97] Because the Ohio statute criminalized "mere advocacy," it was unconstitutional.[98]

In the higher-education context, universities may use *Brandenburg*'s "imminent lawless action" standard to limit the free speech of its on-campus speakers and the assembly rights of protestors.[99] If the exercise of their First Amendment rights reaches this level, their speech is no longer protected. However, this standard remains quite deferential to First Amendment rights.[100]

As courts repeatedly apply *Brandenburg* and its progeny, the speech in question rarely reaches a level adequate to warrant constitutional government interference. In some circumstances, the speech of the individual, while potentially controversial and politically charged, is quite mild. Whether the speakers fail to meet *Brandenburg*'s intent requirement,[101]

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93 *Id.* at 445–46.

94 *Id.* at 446.

95 *See id.* at 448–49.

96 *Id.* at 449.

97 *Id.* at 447 (emphasis added).

98 *See id.* at 449.

99 White v. Lee, 227 F.3d 1214, 1227 (9th Cir. 2000) ("It is clear that the term 'advocacy,' as used in *Brandenburg*, encompasses not only freedom of speech, but the other rights of expression guaranteed by the First Amendment as well.").

100 *See* Jason Paul Saccuzzo, *Bankrupting the First Amendment: Using Tort Litigation to Silence Hate Groups*, 37 CAL. W.L. REV. 395, 412 (2001) ("The result after *Brandenburg* suggests that only in the *most narrow* [sic] of circumstances may speech, even violent speech, be suppressed." (emphasis added)).

101 *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 107–09 (1973) (per curiam) (concluding that an individual's statement that "[w]e'll take the [expletive] street later

imminence requirement,[102] or its likelihood of incitement requirement,[103] the courts properly recognize the speakers' First Amendment rights in lieu of other governmental concerns. In other cases, the individual's behavior is quite extreme.[104] But even in these extreme cases where violence is a foreseeable, or even actual, consequence of the individual's speech, the courts consistently uphold the speaker's rights.[105] Not unlike the stringency of the *Tinker* standard, the *Brandenburg* standard's rigidness may still prove an ineffective device for universities to utilize in minimizing controversial speech that inspires on-campus violence. This exposes institutions to tort liability for the failure to protect their students from injury.

B. Tort Liability and the Duty of Universities to Protect Students from Harm

In considering potential negligence claims that students may bring against universities, the duty of reasonable care that a university owes to its students impacts the university's responsibility to protect its students from violence. In pursuing a

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[or again]" at an antiwar protest did not meet the *Brandenburg* standard, in part because he did not intend for his speech to produce violence).

102 *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (reasoning that the "emotionally charged rhetoric" used by an NAACP leader did not fulfill *Brandenburg*'s imminence requirement when the violence occurred weeks or even months after these speeches).

103 *See, e.g.*, Cohen v. California, 403 U.S. 15, 16, 20 (1971) (wearing a jacket that says "[Expletive] the Draft" in a local courthouse is not likely to incite violence).

104 *See, e.g.*, Citizen Publ'g Co. v. Miller, 115 P.3d 107, 109, 113 (Ariz. 2005) (deciding that a letter to the editor in a local paper was not directed to nor likely to incite imminent lawless action when the letter said, "We can stop the murders of American soldiers in Iraq by those who seek revenge or to regain their power. Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter.").

105 *See* Bible Believers v. Wayne Cty., 805 F.3d 228, 235–36, 238–39, 246 (6th Cir. 2015) (finding that an evangelical Christian group's speech that advocated for Christianity at an Arab event and "harbor[ed] contempt for Islam" was not directed to incite imminent lawless action, even though the group used messages, such as "Islam is a Religion of Blood and Murder," "Turn or Burn," and "Your prophet is a pedophile," and the Muslim crowd reacted by throwing debris at the group). In *Nwanguma v. Trump*, the Kentucky District Court found that President Trump's statement, "Get 'em out of here," was likely to incite violence when a crowd of Trump supporters subsequently began physically attacking a group of Trump protestors. 273 F. Supp. 3d 719, 724 (W.D. Ky. 2017), *rev'd and remanded*, No. 17-6290, 2018 WL 4323966, at *7 (6th Cir. Sept. 11, 2018). Although the Sixth Circuit reversed the district court on appeal, this modern example may indicate a heightened awareness within the courts that controversial speech has yielded exceedingly violent responses in our current politically adverse environment.

negligence claim,[106] a student must establish that he or she experienced an injury, that the injury was foreseeable to the university, that the university had a duty to protect that student, that the university breached the duty, and that the breach was the proximate cause of the injury.[107] Thus, students may not bring a cognizable negligence claim without first establishing that universities owe their students a duty of reasonable care.[108]

This duty has its origin in the *in loco parentis* doctrine, under which universities were largely insulated from legal liability because courts considered the relationship between students and their universities analogous to that between children and their parents.[109] This pre-1960s duty soon evolved to a fully hands-off, "no duty" approach that lasted through the 1980s.[110] Following the "no duty" approach, courts began narrowly imposing duties on universities for certain harms under the vastly similar business-invitee or landlord-tenant theories.[111] Under the "business-invitee" theory, universities owed a duty to students on their campus because of an expectation that these entities would protect students from foreseeable harm.[112] This duty commonly arose in the context of residential life, focusing on providing "reasonably safe premises" for students.[113] Within the landlord-tenant relationship, universities likewise have a duty to protect students from po-

106 RESTATEMENT (SECOND) OF TORTS § 282 (AM. LAW. INST. 1965) ("[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.").

107 Robert C. Cloud, *Extracurricular Activities and Liability in Higher Education*, 198 EDUC. L. REP. 1, 7–8 (2005).

108 *See* Kristen Peters, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 439 (2007).

109 *See* Neil Jamerson, *Who Is the University? Birnbaum's Black Box and Tort Liability*, 39 J.C. & U.L. 347, 349 (2013) ("Historically, courts had based the institution-student dynamic on the concept of *in loco parentis*; accordingly, courts compared an institution's standard of care to what an actual parent owes a child and granted similar immunity to institutional decision-making."); Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 5 (1999) (suggesting that the *in loco parentis* doctrine did not impose a legal duty on universities but instead immunized them from legal liability); Peters, *supra* note 108, at 436 (describing the relationship between students and universities under the *in loco parentis* doctrine as one in which universities had "expansive rights over their students but virtually no responsibilities to them").

110 *See* Jamerson, *supra* note 109, at 349–50.

111 Lake, *supra* note 109, at 16; Peters, *supra* note 108, at 444–46.

112 *See* Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "In Loco Parentis" to Bystander to Facilitator*, 23 J.C. & U.L. 755, 763 (1997).

113 *See* Lake, *supra* note 109, at 12.

tentially harmful individuals through a "duty to provide adequate security to protect students from foreseeable danger."[114]

These business-invitee and landlord-tenant tort theories continue to influence the scope of the duty of reasonable care that universities owe to their students.[115] Although opinions are sometimes divergent, lower state court and District Court decisions from the past thirty years indicate an erosion of the "no duty" approach. As a result, these cases also suggest a shift to a university's assumption of the duty of reasonable care for its students, at least for generally foreseeable harms.[116]

Furek v. University of Delaware is a quintessential duty-of-care case that is representative of this modern evolution.[117] In *Furek*, a student brought a negligence claim against the University of Delaware after he sustained permanent scarring from a hazing ritual during his fraternity's pledging process.[118] The plaintiff's fraternity had hazed members in the five years preceding the incident that caused his injury.[119] Even though the university continuously issued statements denouncing hazing, the hazing persisted, and the administration never directed campus law enforcement to investigate hazing incidents.[120]

The crux of the opinion centered on whether the university owed a duty of care to the student, relying on common law theories of negligence.[121] Recognizing that the relationship between a student and a university alone is insufficient to create a university's duty of care, the court then recognized that a duty may arise when "[the university] knows or should know of an unreasonably dangerous condition."[122] This duty "extends only to the acts of third persons which are both foreseeable and subject to university control."[123] In determining that the hazing here was foreseeable to the university because of its knowledge of the activity, the court explained, "where the property owner has attempted to provide security or regulate a hazard-

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114 Peters, *supra* note 108, at 446.

115 *Id.* at 449.

116 Bickel & Lake, *supra* note 112, at 755 (describing an increased willingness of courts to impose duties on universities through tort law); *see* Peters, *supra* note 108, at 450 (identifying foreseeability as the most crucial consideration in deciding whether a university owes its students a duty of care).

117 594 A.2d 506 (Del. 1991).

118 *Id.* at 509–11.

119 *See id.* at 510.

120 *Id.* at 511.

121 *Id.* at 513–14; *see* RESTATEMENT (SECOND) OF TORTS §§ 343, 449 (AM. LAW. INST. 1965).

122 *Furek*, 594 A.2d at 520.

123 *Id.* at 521.

ous activity, such affirmative action is . . . at least tacit recognition that the potential for harm exists on the premises."[124]

Broadly deciding that universities owe a duty of care to students in these instances, the court concluded, "[universities have] a duty to regulate and supervise foreseeable dangerous activities occurring on [their] property. That duty extends to the negligent or intentional activities of third persons."[125] This case illustrates the potential duties that higher-education institutions today may have in protecting their student bodies from foreseeable harms, including those inflicted by violent protestors. However, in doing so, the universities may also risk trampling the First Amendment rights of these speakers.

III
THE CONSTITUTIONAL CHOICE: SPEECH OR SAFETY?

Universities may face repercussions, from a constitutional perspective, if they choose to prioritize their heightened duty of care to students, to protect them from potential violence, over the First Amendment rights of controversial, on-campus speakers. Likewise, universities may encounter potential tort liability if they decide to recognize the First Amendment rights of speakers instead of canceling speeches due to safety concerns. State legislatures have initiated their responses to this issue, but their reaction is ineffective in resolving the key tension between First Amendment rights and tort law. In this specific context, a university's constitutional obligations should give way to the tort duty it owes to students by aligning institutional policies with a revised *Brandenburg* standard.

A. Constitutional Caveats: First Amendment Implications

By choosing to emphasize their duty of care to protect students from the foreseeable harms of violent protests, universities run the risk of violating the free-speech rights of

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124 *Id.* at 521–22.

125 *Id.* at 522; *see also* Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (concluding that the university owed a duty of care to a student who it knew had a propensity for self-harm and later committed suicide because it had knowledge of potential harm); Mullins v. Pine Manor Coll., 449 N.E.2d 331, 333, 335–36 (Mass. 1983) (stating that the university owed a duty of care to a student who was sexually assaulted by an intruder because of its duty to "protect resident students from foreseeable harm"); Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1050 (Me. 2001) (holding that the university owed a duty of care to a student who was sexually assaulted on campus because this type of assault on a university campus is foreseeable and the university had a legal duty to protect students from such foreseeable danger).

controversial speakers. Universities that enact such policies face an expedient threat of constitutional violations. Because many of the speakers that have recently inspired on-campus violence hold conservative ideals, universities that cancel their speeches become particularly vulnerable to allegations of content and viewpoint discrimination under the First Amendment.[126]

As discussed in Part II, the government cannot ban speech based on its offensive content alone. On-campus speakers have the right to voice their opinions, even if they are controversial. Provocative speakers like Milo Yiannopoulos and Ann Coulter provide commentary that may "induce[ ] a condition of unrest" or "stir[ ] people to anger," but universities may not automatically prohibit them from speaking just because others find their speech "offensive."[127] If universities prohibit figures like Richard Spencer from coming to their campuses solely because of the offensiveness of their messages, they will violate the speakers' First Amendment rights. While their speech is certainly offensive, it still deals with "matters of public concern."[128] The contested speech in *Snyder v. Phelps* was not unlike that expressed by these inflammatory speakers.[129] The speakers are not engaging in "refined social or political commentary," but it is commentary nonetheless. However, universities are not canceling speakers exclusively because of the offensive nature of their speech, but out of greater safety concerns.

When universities take such action to prevent violence, they inevitably consider the viewpoint of the controversial speakers. The "motivating ideology" of these outside lecturers

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126 *See* discussion *supra* sections II.A.2, II.A.3.

127 Texas v. Johnson, 491 U.S. 397, 408–09 (1989).

128 Snyder v. Phelps, 462 U.S. 443, 456 (2011).

129 *See, e.g.*, Callum Borchers, *Is Richard Spencer a White Nationalist or a White Supremacist? It Depends on the News Source*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/10/19/is-richard-spencer-a-white-nationalist-or-a-white-supremacist-it-depends-on-the-news-source/?utm_term=.9b36f04a3c20 [https://perma.cc/W8Z3-E2LN] (citing an interview with Richard Spencer during which he said that "[t]he ideal of a white ethno-state—and it is an ideal—is something that I think we should think about in the sense of what could come after America"); Radhika Sanghani, *Ann Coulter: The Woman Trying to Be America's Most Hated*, TELEGRAPH (Sept. 7, 2016, 4:44 PM), http://www.telegraph.co.uk/women/politics/ann-coulter-the-woman-trying-to-be-americas-most-hated/ [https://perma.cc/LNN8-ZM3V] (quoting Ann Coulter's response in an interview that she "just want[ed] Jews to be perfected, as they say"); Milo Yiannopoulos, *Science Proves It: Fat-Shaming Works*, BREITBART (July 5, 2016), http://www.breitbart.com/milo/2016/07/05/fat-shaming-is-good-science/ [https://perma.cc/G5Y4-WBG5] ("My view, of course, is that if you are obese, you should hate yourself.").

is exactly what sparks reactionary violence; without these speakers' controversial opinions, students and community members would not protest their presence. Accordingly, universities will necessarily make decisions based on the speakers' viewpoints in fulfilling their duties to student safety. Currently, most of these speakers tend to represent viewpoints from the far right of the political spectrum. Universities may require that their facilities are used for certain subject matters only, creating "limited public forums." But if universities do not suppress all political viewpoints, and instead suppress only those that express conservative ideals, they may impermissibly exclude conservative viewpoints. This would be viewpoint discrimination in violation of the First Amendment.

Indeed, individuals have already brought constitutional claims against universities, including Michigan State University, Berkeley, Auburn University, and Ohio State University, after the universities prohibited certain individuals from speaking on campus for safety reasons. These allegations have centered on content and viewpoint discrimination. For example, the organizer of Richard Spencer's collegiate speaking tour filed a complaint against Michigan State University for violating the organizer's First Amendment rights, claiming the university's cancellation of Spencer's event constituted unlawful viewpoint discrimination.[130] The Young America's Foundation and the Berkeley College Republicans also brought a claim against Berkeley, seeking relief after the university canceled

130 Plaintiff's Verified Complaint at 3, 6, 8, Padgett v. Bd. of Trs. of Mich. State Univ., No. 1:17-CV-00805 (dismissed Jan. 18, 2018). The same plaintiff brought a similar claim against Ohio State University for its cancellation of a speaking engagement by Richard Spencer. *See* Plaintiff Cameron Padgett's Verified Complaint at 10, Padgett v. Bd. of Trs. of the Ohio State Univ., No. 2:17-cv-00919-ALM-KAJ (dismissed Mar. 23, 2018) (describing a trend of "de facto censorship of right-of-center political viewpoints" on university campuses (emphasis omitted)). Both cases were settled or dismissed before the courts fully considered their merits. *See* Joint Stipulation of Dismissal with Prejudice, at 1, Padgett v. Bd. of Trs. of Mich. State Univ., No. 1:17-CV-00805 (dismissed Jan. 18, 2018); Stipulation of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(ii), at 1, Padgett v. Bd. of Trs. of the Ohio State Univ., 2:17-cv-00919-ALM-KAJ (dismissed Mar. 23, 2018); *see also* Jennifer Chambers, *MSU Will Allow White Nationalist to Speak on Campus*, DETROIT NEWS (Jan. 18, 2018, 5:25 PM), https://www.detroitnews.com/story/news/local/michigan/2018/01/18/msu-will-allow-white-nationalist-speak-campus/109573858/ [https://perma.cc/VUF4-3W9G]; Dan Sewell, *White Nationalist, Ohio State Ending Lawsuit*, U.S. NEWS (Mar. 7, 2018, 11:35 AM), https://www.usnews.com/news/us/articles/2018-03-07/white-nationalist-ohio-state-ending-lawsuit [https://perma.cc/AB7S-SC4C].

Ann Coulter's speech last spring.[131] Here, the student groups asserted that Berkeley "engaged in viewpoint discrimination by selectively enforcing the policy's unreasonable time, place, and manner restrictions" to extinguish conservative expression.[132]

Some courts have agreed. After Auburn University initially canceled a speaking engagement by Richard Spencer, a federal district court judge overrode the university's action, ruling that "[d]iscrimination on the basis of message content cannot be tolerated under the First Amendment."[133] While the Northern District of California granted Berkeley's motion to dismiss for the viewpoint discrimination and First Amendment retaliation claims against it, other First Amendment claims that involve the university's speaker policies are still pending.[134] Accordingly, universities can expect imminent litigation if they choose to protect their students' safety and disinvite these speakers.

The heckler's veto is also worth considering here.[135] Protestors are merely exercising their First Amendment rights to peacefully assemble and protest the speech they deem unpalatable. But when universities disinvite speakers because they fear violence will erupt, they may effectuate a heckler's veto, suppressing the speakers' own free speech rights. Public university administrators step in as the governmental agents that struggle to maintain campus decorum without unconstitutionally penalizing the speaker. Protestors may not silence even the most odious of on-campus speakers in this way. But the veto here involves more than mere heckling. This is a sustained threat of violence from protestors who have caused significant damage and destruction. The veto calls for solutions from higher-education institutions, which are in the best position to address this threat and, indeed, have a duty to do so. Thus, constitutional claims of a heckler's veto are less viable because the violence necessitates that universities act to prevent student harm and subsequent tort liability.

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131 Verified Complaint for Injunctive, Declaratory, and Monetary Relief Pursuant to 42 U.S.C. § 1983 at 2–3, Young America's Found. v. Napolitano, No. 3:17-CV-02255 (filed Apr. 24, 2017).

132 *Id.* at 23.

133 *See* Saul, *supra* note 8.

134 *See* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, at 7–8, 11, 16–17, Young America's Found. v. Napolitano, No. 17-CV-02255-MMC, 2018 WL 1947766 (N.D. Cal. Apr. 25, 2018).

135 *See* discussion *supra* section II.A.3.

B. Necessarily Negligent: Tort Liability Implications

Because of the evolving duty of care that universities owe to their students, universities now have a duty to protect their students from violent protests that provocative speakers precipitate, an increasingly foreseeable harm.[136] Moreover, universities have taken initiative to enact security measures in anticipation of potentially violent speeches, a "tacit recognition that the potential for harm exists on [their] premises."[137] They have assumed the duty to provide "reasonably safe"[138] campuses and "adequate security"[139] to their students. This duty extends to averting the violent acts of protestors. Not only is such violence foreseeable, but these acts are subject to university control.[140] Universities can prevent the violence by canceling the speeches of the speakers that incite it. If they fail to do so, they risk liability and increased university costs because students would predictably bring negligence claims against these institutions for any resulting harm.[141]

Once students establish that universities owe them a duty of care to protect against destructive protests on campus, the other elements of negligence are readily met.[142] Students can easily demonstrate that they have experienced physical injuries by medical records and documentation. Such physical injury is foreseeable to the university—students and administrators have sustained injuries during several violent protests recently, and these events were heavily publicized.[143] By refusing to cancel provocative speeches that will likely cause violence on campus, universities breach their duties to protect students from physical injury. Violent protests result, causing harm to property and, more importantly, to students.

If universities choose to staunchly uphold the First Amendment rights of controversial speakers, they open the door for a bevy of negligence claims. Because their duties require them to prevent student harm, universities will need to craft policies to address the potential violence that may arise when provocative figures are scheduled to speak on their campuses. Such action

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136 *See* discussion *supra* subpart II.B.

137 Furek v. Univ. of Del., 594 A.2d 506, 521–22 (Del. 1991); *see* discussion *infra* Part IV.

138 *See* Bickel & Lake, *supra* note 112, at 762.

139 *See* Peters, *supra* note 108, at 446.

140 *See* discussion *supra* subpart II.B.

141 *See* Jamerson, *supra* note 109, at 368.

142 *See* Cloud, *supra* note 107, at 7–8.

143 *See* discussion *supra* Part I.

may include disinviting these controversial speakers, which, in turn, exposes the university to constitutional allegations.

C. The Legislature's Inadequate Response

In response to the escalating friction between controversial speakers and protestors, Republican lawmakers have introduced legislation that compels universities to ardently protect the free-speech rights of on-campus speakers and punish those that protest against them.[144] For example, Tennessee House Bill 739 specifically provides that higher-education institutions must adopt a policy that "requires the campuses of the institution be open to any speaker whom students, student groups, or members of the faculty have invited."[145] North Carolina has passed a similar bill. North Carolina House Bill 527 also recognizes that campuses should be open to speakers invited by students, student groups, and faculty.[146] It requires disciplinary sanctions for those disrupting others that engage in "expressive activity," a veiled reference to those protesting potentially controversial speakers.[147]

This defective legislative solution may create more potential liability for universities. Some have claimed that these statutes unconstitutionally infringe on the First Amendment rights of demonstrators, who have the right to peacefully assemble and protest opposing views.[148] By failing to adequately protect the free speech rights of protestors, it exposes universities to sustained constitutional violations. Further, these laws hold universities accountable for the actions of others whose behavior they cannot control, such as protesters from outside the campus community.[149] Moreover, the response is broadly inadequate because it does little to address a university's duty to protect its students from the foreseeable harm of violent protests. The threat of tort liability remains.

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144 *See* Peter Schmidt, *State Lawmakers Seek to Force Public Colleges to Protect Speech Rights*, CHRON. OF HIGHER EDUC. (Feb. 10, 2017), http://www.chronicle.com/article/State-Lawmakers-Seek-to-Force/239171 [https://perma.cc/J3K9-T883].

145 H.B. 739, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017).

146 *See* H.B. 527, 2017 Gen. Assemb., 2017 Sess. (N.C. 2017).

147 *Id.*

148 *See* Lauren Camera, *Campus Free Speech Laws Ignite the Country*, U.S. NEWS (July 31, 2017, 5:40 PM), https://www.usnews.com/news/best-states/articles/2017-07-31/campus-free-speech-laws-ignite-the-country [https://perma.cc/6B7H-L8MC].

149 *See* Schmidt, *supra* note 144.

D. A Proposed Solution: The Revised *Brandenburg* Standard

Courts and public universities should look to the Supreme Court's constitutional guidance in *Brandenburg v. Ohio* to provide a solution to the conflicting interests between the First Amendment and tort law in this context. When deciding whether they should disinvite speakers that have created the threat of on-campus violence, universities should adopt a revised standard based on *Brandenburg*'s well-established rule: the elimination of the "directed" intent requirement for outside speakers "likely to incite or produce [imminent lawless] action" on university campuses.[150] This standard would be limited to circumstances involving public education. If outside speakers are likely to incite or produce imminent lawless action, then the university should not allow them to speak on campus.

The current *Brandenburg* standard and its "directed" intent requirement is not robust enough to prevent the violence that accompanies speeches by controversial figures at universities. Courts have consistently upheld speech that is incredibly likely to incite violence because the speech was not necessarily *directed* to create this violence.[151] Even if the speech was so directed, the intent requirement is exceedingly difficult to satisfy; it requires nearly unascertainable evidence of the speaker's intent. The revised standard lessens the high burden that the government must overcome under *Brandenburg*. While the revised standard may have implications for protestors, it becomes a particularly useful tool for helping universities to restrict the speech of the contentious outside speakers that fuel destructive responses. Without these speakers, the probability of violent protests diminishes significantly.

Tinker, which applies to universities, emphasizes that students have First Amendment rights that encompass all school-related activities.[152] This may include inviting controversial speakers to campus. *Tinker* also gives higher-education administrators flexibility to enforce campus rules and allows them to restrict student speech that may cause "substantial disruption of or material interference with school activities."[153] But *Tinker* is insufficient in combatting antagonistic speakers and corresponding violent protests on university campuses. Although these destructive protests are certainly of the caliber

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150 *See* discussion *supra* section II.A.5.
151 *See id.*
152 *See* discussion *supra* section II.A.4.
153 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

to cause "substantial disruption of or material interference with" university programming, courts rarely uphold attempts to quash the political speech of students without a high predictability that the speech would cause disruption.[154] However, *Tinker*'s biggest flaw here is its tendency to focus on student-centric behavior.[155] Many of these controversial speakers are student-sponsored, but are not students themselves. Neither are many protestors. Thus, *Tinker* proves ineffective in addressing the violence that these outside speakers may incite. *Brandenburg* provides the opportunity for a more workable solution.

Concededly, the elimination of *Brandenburg*'s intent requirement may have a disproportionate impact on "unpopular" opinions.[156] But the unpopularity of these opinions is what incites on-campus violence from protestors.[157] Universities must have the flexibility to ensure student safety on their campuses and protect their students from injury, even if that sometimes affects the First Amendment rights of outside speakers. This remains faithful to the policy that the Supreme Court set forth in *Tinker*. Further, universities are distinct, warranting additional protection that is not available or even constitutional in other forums.[158] Administrators must have the power to maintain order on their campuses, and that sometimes requires restriction of free speech.

Some scholars, like Erwin Chemerinsky and Howard Gillman, assert that the First Amendment rights of controversial speakers should always trump those of others, including the rights of protestors.[159] The rationale for their argument hinges on the acknowledgement that the modern expansion of free-speech rights has advanced equality.[160] This recognition is an important one—free speech has played a vital role in social progress.[161] However, this argument fails to give appropriate

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154 *See* discussion *supra* section II.A.4.

155 *See id.*

156 *See* Laura W. Brill, Note, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984, 1044 (1994).

157 *Cf.* Robert C. Post, *There Is No 1st Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017, 11:33 AM), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests [https://perma.cc/8A7R-YYRT] ("[S]peakers are almost always invited to campus because of their viewpoint, because someone thinks they have something worthwhile to say." (emphasis omitted)).

158 *See id.*

159 *See* CHEMERINSKY & GILLMAN, *supra* note 1, at 23–26.

160 *See id.*

161 *See id.*

deference to the rights of protestors, who may also have an important part in social progress. Further, this contention does not give universities a viable solution to implement when addressing potential on-campus violence, especially in light of the rising tort obligations they owe to their students.

Robert Post instead argues that universities should only invite speakers that advance the universities' educational missions.[162] These speakers' messages must enhance "the research or educational functions of the university."[163] While Post aptly identifies that university administrators need the freedom to manage their campuses, this standard is too broad in that most speakers could arguably meet it. Therefore, this requirement does not adequately protect students from the violent protests that these speakers incite and makes universities vulnerable to tort liability.

In contrast, limiting the use of the revised *Brandenburg* standard to outside speakers on university campuses still largely protects students' First Amendment rights. In turn, it provides universities with the discretion to prevent the "foreseeable harm" of violent protests, a heightened duty they owe to their students. Thus, focusing on *Brandenburg* poses a greater likelihood of protecting students from harm when controversial speakers come to campus while also minimizing any infringement on the students' free speech rights.

IV
IMPLICATIONS FOR UNIVERSITY ADMINISTRATIVE POLICIES

As controversial speakers continue to pose a challenge to universities seeking to satisfy both their constitutional obligations and tort duties, university administrators will need to implement policies to guide administrative responses to these situations. In crafting its own solution to controversial speakers and resulting protests, one public university has devised a speaker-friendly policy. However, this policy is ultimately ineffective. Instead, the revised *Brandenburg* standard should govern the policies that universities create to protect themselves from liability.

A. A University's Underwhelming Undertaking

On October 6, 2017, the University of Wisconsin approved a new free-speech policy amid escalating tensions between in-

162 Post, *supra* note 157.
163 *Id.*

flammatory guest speakers and their protesters.[164] This policy attempts to address the First Amendment concerns that have emerged from this tension.[165] With a primary focus on the actions of protestors, the policy imposes punishments on student protestors who interfere with on-campus speeches.[166] If students disrupt on-campus speeches twice, they will face suspension, and if students violate the policy a third time, they will face expulsion from the university altogether.[167]

In implementing this policy, the University of Wisconsin has thus decided to prioritize the First Amendment rights of speakers, taking extra precautions to prevent a heckler's veto.[168] This policy therefore reflects the legislative responses from states, such as Tennessee and South Carolina, that protect speakers and punish protestors.[169] Accordingly, this policy is similarly flawed. Most apparent, this policy does not sufficiently protect the First Amendment rights of student protestors.[170] By prioritizing the rights of speakers and failing to place similar restrictions on them, the university makes an unconstitutional choice to subordinate the free-speech rights of all students. Simultaneously, it fails to recognize the foreseeable harm that controversial speakers may incite, placing the focus solely on the protestors.

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164 Todd Richmond, *University of Wisconsin Approves Free Speech Policy that Punishes Student Protesters*, CHI. TRIB. (Oct. 6, 2017, 8:19 PM), http://www.chicagotribune.com/news/nationworld/midwest/ct-university-of-wisconsin-protest-punishment-20171006-story.html [https://perma.cc/53UW-QF5U].

165 *See id.*

166 *See id.*; *see also Regent Policy Document 4-21: Commitment to Academic Freedom and Freedom of Expression*, U. WIS. SYS., https://www.wisconsin.edu/regents/policies/commitment-to-academic-freedom-and-freedom-of-expression/ [https://perma.cc/JPY6-782K] (last visited Sept. 19, 2018) ("Protests and demonstrations that materially and substantially disrupt the rights of others to engage in or listen to expressive activity shall not be permitted and shall be subject to sanction.").

167 *Regent Policy Document 4-21*, *supra* note 166.

168 *See* discussion *supra* section II.A.3.

169 *See* discussion *supra* subpart III.C.

170 *See* Beatrice Dupuy, *Wisconsin University Officials Approve Policy Punishing Students for Protesting Campus Speakers*, NEWSWEEK (Oct. 10, 2017, 1:46 PM), http://www.newsweek.com/university-wisconsin-aims-target-violent-protests-against-speakers-681695 [https://perma.cc/J7Q7-Q945] (acknowledging criticism that protestors also have First Amendment rights). For a critique on the policy's other potential weaknesses, see Kashana Cauley, *When Conservatives Suppress Campus Speech*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/opinion/conservatives-campus-speech-wisconsin.html [https://perma.cc/TK7M-MXKY].

B. Policy Recommendations under the Revised *Brandenburg* Standard

Disregarding the University of Wisconsin's approach, public universities should instead refer to the revised *Brandenburg* standard in drafting administrative policies when potentially controversial figures are invited to speak on their campuses. Recognizing the special duty that universities have to protect against the foreseeable harm of on-campus violence, this standard protects universities against tort liability while still promoting the First Amendment rights of students. Under the revised *Brandenburg* standard, higher-education administrators may disinvite speakers who are likely to incite or produce imminent lawless action on their campuses, regardless of the speaker's intent.[171] Universities should maximize First Amendment rights as much as practicable, including those of controversial speakers that engage in offensive speech, until the revised *Brandenburg* standard is met. At that point, the university's constitutional responsibilities should give way to its need to avoid tort liability.

To comply with this standard, administrators may implement the following policy recommendations:

- Utilize the revised *Brandenburg* standard only in cases where controversial outside speakers are invited to speak on campus or are using on-campus facilities for their own speaking events.
- Use the *Tinker* standard to govern the First Amendment rights of student speakers and protestors. In using *Tinker*'s "substantial disruption of or material interference with" standard,[172] the university must provide factual support and specific evidence that the student speech will meet this standard.[173]
- Apply policies equally to all types of speech and speaker ideologies to minimize allegations of content and viewpoint discrimination.
- Track and research the speakers that student groups and other university affiliates invite to speak on campus and the speakers that intend to use university facilities to hold their own speaking engagements to identify potentially controversial speakers.
- Monitor press coverage associated with the speaking engagements for information regarding any potential protests that may arise in reaction to the events. Press

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171 *See* discussion *supra* subpart III.D.
172 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
173 *See* discussion *supra* section II.A.4.

coverage may include university media outlets, local news outlets, and social-media platforms.

- Gauge the extent of the foreseeability of student harm that may arise from a potential protest. As the foreseeability of student harm from protests increases, the duty that the university owes to its student body increases, necessitating action from the university to disinvite the speaker or take other safety precautions. In determining the foreseeability of student harm, universities may consider the following: (1) whether students have reacted violently to the same speaker on other campuses; (2) whether the university itself has experienced violent protests in reaction to controversial speakers; (3) whether campus and local law enforcement have recognized any indication of potential campus violence; and (4) whether the location and time of the speech will make student populations particularly vulnerable to harm (i.e., if the speech will take place at a venue located in the middle of campus or on the edge of campus, if the speech will take place during the school day or at night, etc.).
- Determine if a speaker is likely to incite or produce imminent lawless action under the revised *Brandenburg* standard. To do so, universities may consider the following: (1) whether speaking engagements by the same speaker have spurred violent protests or other violent reactions; (2) whether the speaker promotes violence or other illegal activities in their communications; and (3) whether the speaker has made statements similar to that of other speakers who have inspired violent protests at other universities. While the content of the speech may be an influential factor in determining this, the university cannot make the determination based on the content of the speech alone and should consider other contextual factors.
- If student harm is foreseeable and the speaker meets the revised *Brandenburg* standard, the university should create an action plan for preventing student harm.
- An effective action plan will align with the university's duty to provide "reasonably safe premises" for students under a "business-invitee" theory or the duty to furnish the campus with "adequate security" under a "landlord-tenant" theory. For maximum effectiveness, the action plan should call for the cancellation of the speaking engagement. At a minimum, the plan should call for enhanced security measures and law enforcement efforts to protect students from potentially violent reactions to the speech.

- While the ultimate responsibility for student safety remains with a university's administration, the university may create a committee to assist with addressing campus safety and free-speech issues. Committee members may include university administrators, the university's general counsel, on-campus law enforcement, board of trustee members, and student representatives. This committee will keep the university informed about current campus events and safety concerns.

CONCLUSION

In simultaneously protecting their student bodies from violence and upholding students' First Amendment rights, universities face more than the cost of litigation. In preparing for these speaking engagements and their related protests, the possibility of violence and destruction imposes high security costs on universities. From February 2017 through September 2017, the University of California, Berkeley spent $1.5 million on security for on-campus protests.[174] Since the beginning of its fiscal year in July 2017, the university has spent $2 million on protest-related expenses.[175] Although the right-wing-sponsored "Free Speech Week" was later canceled,[176] Berkeley projected that it would have spent $1 million on security precautions for the event, and it spent $800,000 on security for a short appearance by Milo Yiannopoulos in September 2017.[177] Berkeley also spent $600,000 on security for an appearance by Ben Shapiro, another conservative speaker.[178] Similarly, the University of Florida paid an estimated $600,000 in preparation for Richard Spencer's speech on its campus.[179] Unsurprisingly, the damage itself can be a significant financial burden. The February 2017 protests against Milo Yianno-

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174 Aaron Hanlon, *What Stunts Like Milo Yiannopoulos's 'Free Speech Week' Cost*, N.Y. TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/opinion/milo-yiannopoulos-free-speech-week-berkeley.html [https://perma.cc/E43B-HVE3].

175 Madison Park, *Universities Face Rising Security Costs for Controversial Speakers*, CNN (Oct. 31, 2017, 9:07 AM), http://www.cnn.com/2017/10/31/us/cost-of-speech-universities/index.html [https://perma.cc/X4QM-D47K].

176 Jacey Fortin, *Free Speech Week at Berkeley Is Canceled, but Milo Yiannopoulos Still Plans to Talk*, N.Y. TIMES (Sept. 23, 2017), https://www.nytimes.com/2017/09/23/us/milo-berkeley-free-speech.html [https://perma.cc/8EHR-TVYA].

177 Park, *supra* note 175.

178 Hanlon, *supra* note 174.

179 *Protesters Drown Out Richard Spencer at University of Florida*, *supra* note 27.

poulos's appearance at Berkeley cost the university $100,000 for the related on-campus damage.[180]

Controversial campus speakers and their reactionary protests may pose a greater threat to students than physical injury—it may also impact the fees students pay as part of their tuition.[181] Indeed, some universities, including the University of Washington, have attempted to shift increasing security fees onto their student groups.[182] The University of Washington's policy cost the school $122,500 in legal fees before it ultimately settled with the student group that sought to avoid paying the $17,000 security charge.[183] These increasing financial burdens, in combination with increasing violence, demand action from higher-education administrators to protect their students (and themselves) from rising harm and rising expenses.

Violence will continue to infiltrate university campuses amid an increasingly turbulent political environment. While campus safety and student well-being are certainly important educational duties, colleges must also uphold the constitutional rights of all students. By shifting their focus from the intent to the effect of the outside speakers that higher-education institutions invite on campus, administrators will best protect their students' First Amendment rights and their right to a safe campus environment.

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180 Park & Lah, *supra* note 2.

181 *See* Hanlon, *supra* note 174. *Contra* Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 CIV. RTS. L.J. 349, 403 (2011) (proposing that universities and taxpayers rather than students should bear the increased security costs for controversial on-campus speakers).

182 Zach Winn, *UW to Pay $122,500, Change Speaker Policy in Settlement with College Republicans*, CAMPUS SAFETY MAG. (June 20, 2018), https://www.campussafetymagazine.com/university/u-washington-college-republicans-lawsuit/ [https://perma.cc/H8WC-5YZV].

183 *Id.*